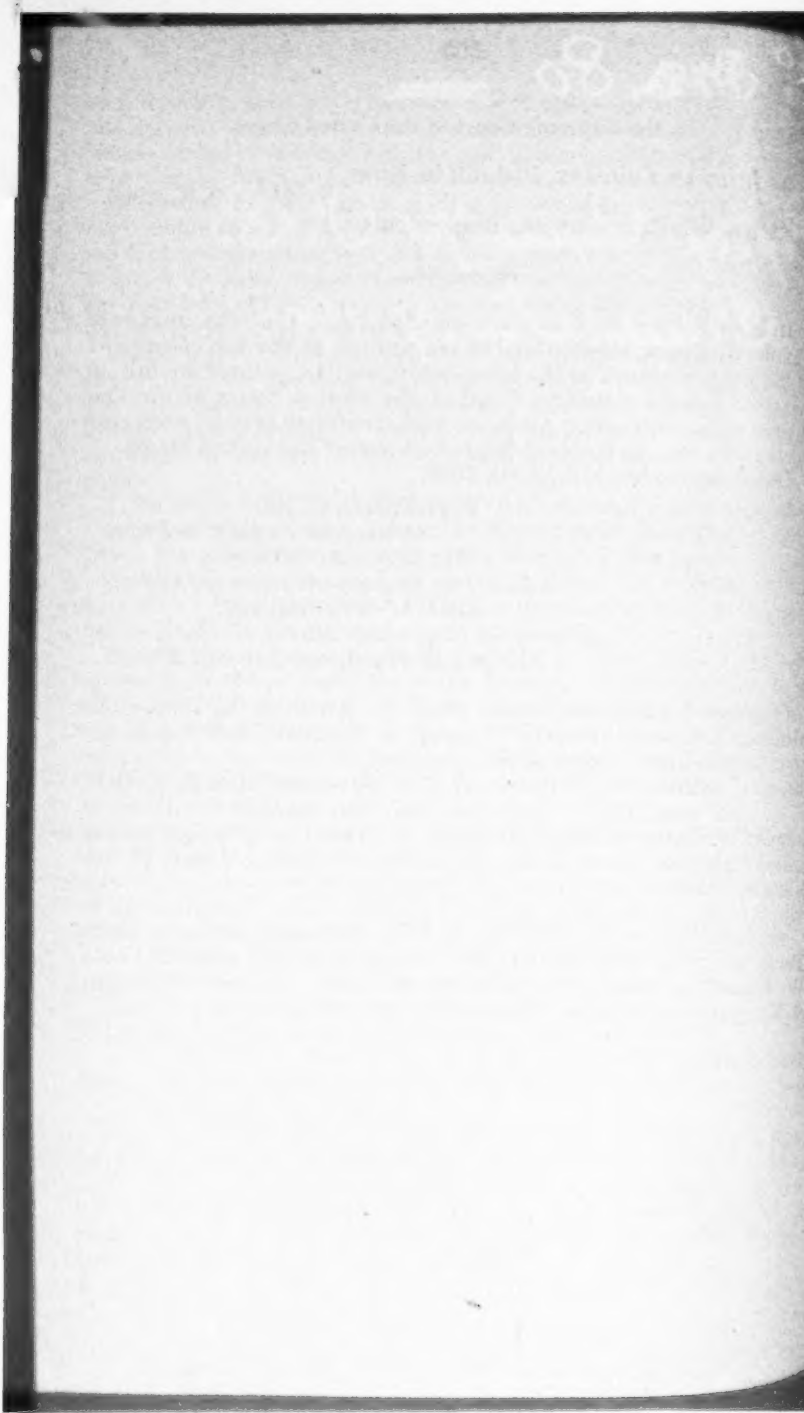


No. 892. 80

FILED
NOV 9 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of United States.

Brf. of Ayers for P. E.

Filed Nov. 9, 1900.

OCTOBER, A. D. 1900, TERM.

THE MIDWAY COMPANY, Plaintiff in Error,

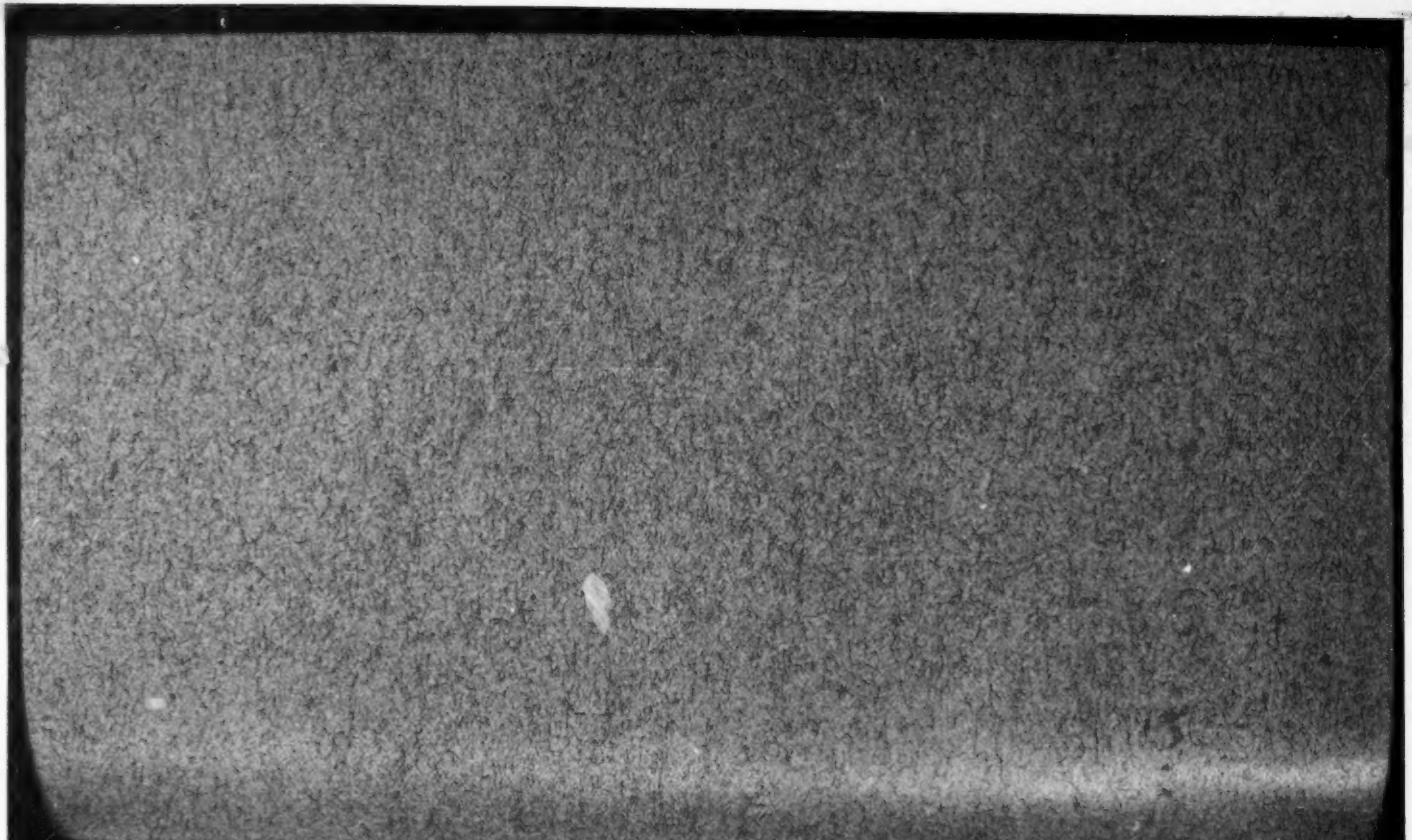
vs.

FRANK W. EATON, ET AL., Defendants in Error.

Motion to Advance Cause on Calendar, Affidavit and Notice.

WALTER AYERS,
Attorney for Plaintiff in Error.

J. L. THWING,
BOOK AND COMMERCIAL PRINTER,
DULUTH, MINN.



Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,

Plaintiff in Error,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF.

Defendants in Error.

NOTICE OF MOTION.

Gentlemen:—

You will please take notice, That on Monday the 12th day of November, A. D. 1900, at the Court Room of the Supreme Court of the United States in the Capitol at Washington, D. C., at the opening of said Supreme Court on that day or as soon thereafter as counsel can be heard, a motion, of which the annexed is a copy, to advance the above entitled cause upon the Calendar so that the same may be heard as soon as conveniently may be after the first day of January, A. D. 1901, will

be submitted. Accompanying said motion will also be submitted the affidavit and copy of the decision of the Supreme Court of Minnesota, copies whereof are hereto attached and herewith served upon you.

Yours respectfully,

WALTER AYERS,

4 Attorney for The Midway Company,
Plaintiff in Error.

To Messrs.
J. L. WASHBURN,
Atty. for Leonidas Merritt,
Merrill M. Clark &
Richard H. Fagan.
CHARLES A. TOWNE,
Atty. for Frank W. Eaton and
5 Margaretha Lonstorf.
Defendants in Error.

Service of the foregoing notice of motion, and papers accompanying the same, to-wit, Motion, Affidavit, and copy of the decision of the Supreme Court of Minnesota, are hereby admitted at Duluth, Minnesota, this 27th day of October, A. D.
6 1900.

J. L. WASHBURN,
Attorney for Leonidas Merritt, Merrill M. Clark & Richard H. Fagan.

CHAS. A. TOWNE,
Attorney for Frank W. Eaton and Margaretha Lonstorf,
Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,

Plaintiff in Error, 7

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF.

Defendants in Error.

No. 312.

8

The Midway Company, Plaintiff in Error, above named by Walter Ayers, its attorney, respectfully moves that the said cause which is No. 312 upon the October, A. D. 1900 Term Calendar of this court, may be advanced and heard as soon as conveniently may be after the first day of January, A. D. 1901.

The matter involved in said cause is the validity of a certain location of Sioux Half-Breed 9 Scrip issued under the Act of Congress, approved July 17th, 1854, (10 Stats. at Large, 304), which was cancelled in pursuance of an unpublished decision of the Secretary of the Interior, dated February 18th, 1889.

The Supreme Court of Minnesota by its decision, upon which was based the judgment upon

which the Writ of Error in the above cause was sued out, decided that the scrip location was valid, that the Land Department had no authority to cancel the same and that the patent issued by the United States under which the plaintiff in error claims, conveys no title. The grounds upon which
10 the decision of the Supreme Court of Minnesota rested, were:

First. That the clause contained in said act of July 17, 1854, to-wit: "And provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid" did not prevent or prohibit an assignment by the Half-Breed before location, of the right evidenced by such scrip; that the beneficial interest in said scrip could be assign-
11 ed and transferred although the scrip itself could not be, and that the right to acquire public lands by means of this scrip was not a personal right in the one to whom the scrip issued.

Second. That the clause in said act, providing that said scrip might be located upon "any other unsurveyed lands not reserved by the government upon which they (the Half-Breeds) have respectively made improvements" did not require
12 that any improvements should be made by the Half-Breed or by anyone else as a condition precedent to the location of the scrip thereon, nor at all, unless possibly for the purpose of giving notice to some possible settler upon the same lands, and that in any event such improvements might be made by one, not the original beneficiary, for himself and as a means of procuring the location of the scrip for his own use and benefit.

Third. That as the act of July 17, 1854, did not provide for the issuance of a patent, that no patent was necessary, and the legal title to the land passed by virtue of the location, and the Land Department had no right to assume a supervisory power over the location of Sioux Half-Breed Scrip and no jurisdiction to inquire into the same.

The reasons for this application are as follows:

1st. That many cancellations of locations of Sioux Half-Breed Scrip have been made by the Land Department of the United States beginning shortly after the passage of the act of July 17th, 1854, and continuing to the present time, a more particular reference to which is made in the appended affidavit. Under said decision all titles derived from the United States by patent or otherwise, wherever there has been a cancelation, for whatsoever cause, of Sioux Half-Breed Scrip, are absolutely void, and many titles in Minnesota and elsewhere, as well those of long standing as the more recent titles, are overthrown or clouded.

2nd. That there is still outstanding unsatisfied and in the hands of persons other than the original beneficiaries, a considerable amount of Sioux Half-Breed Scrip, which by reason of the decision of the Supreme Court of Minnesota will be made the subject of sale to purchasers upon the faith of said decision.

3rd. Litigation has already begun in Minnesota based upon said decision of the said Supreme Court instituted by claimants under locations of

Sioux Half-Breed scrip which have been cancelled, to oust the holders of the patent title to the land involved, which, or similar litigation, it is supposed, will be general in said state and extend to all cases wherever there has been a cancellation by the Land Department of a location of Sioux Half-
16 Breed Scrip.

4th. As a special and particular circumstance the fact is referred to, that nowhere in said decision of the Supreme Court of Minnesota is the case of Felix vs. Patrick, 145 U. S., 317, or Carter vs. Ruddy, 166 U. S., 493, referred to, although as shown by the appended affidavit said cases were pressed upon the attention of the Supreme Court of Minnesota. That said decisions in Felix vs.
17 Patrick and Carter vs. Ruddy are directly overthrown by the said decision of the Supreme Court of the State of Minnesota.

5th. That all persons dealing with th Land Department of the United States in the matter of acquiring titles, whether by means of Sioux Half-Breed Scrip or where there has been a cancellation thereof, are left in doubt and uncertainty as to the title to be acquired and the powers and func-
18 tions of the Land Department.

6th. Much important litigation is dependent upon the decision in the above entitled cause, affecting other lands and other parties, a particular reference to which is made in the appended affidavit.

Reference is prayed to the appended affidavit for a fuller and more detailed statement concern-

ing the grounds for the foregoing motion hereinabove set forth, including the copy of the decision of the Supreme Court of Minnesota, annexed to said affidavit.

The objects sought by means of a speedy decision of the above entitled cause, are that titles depending upon Sioux Half-Breed Scrip locations may be settled; that the public may be safe-guarded in the matter of any attempted purchase of any outstanding certificates or scrip issued under the act of July 17th, 1854; that the powers and duties of the Land Department in matters relating to Sioux Half-Breed Scrip may be defined and settled; that the litigation dependent upon the above entitled cause and which has been pending for many years, may be settled and terminated, and that further litigation affecting other lands and between other parties, based upon or growing out of said decision of the Supreme Court of the State of Minnesota, be made unnecessary.

Respectfully submitted,

WALTER AYERS,

Attorney for The Midway Company,

Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,

22 Plaintiff in Error and Appellant,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF.

Respondents and Defendants in Error.

STATE OF MINNESOTA, COUNTY OF ST.

23 Louis.—ss.

Walter Ayers, being duly sworn upon his oath, deposes and says, that he is the counsel for The Midway Company, the plaintiff in error in the above entitled cause, which is numbered 312 upon the October, A. D. 1900, Term Calendar of this Court, and which involves the same question as the Midway Company substituted for the Germania Iron Company, Plaintiff in Error vs. Frank

24 W. Eaton, and others, Defendants in Error, also upon the October, A. D. 1900, Calendar of this Court, as number 313.

That the action in which the Writ of Error was sued out in the above entitled cause was an action to determine adverse claim to certain real estate situate in the County of St. Louis and State of Minnesota, to-wit: Three lots or tracts con-

sisting of forty acres each, according to the Government survey, and that the action in which the Writ of Error was sued out in the case of the Midway Company substituted for the Germania Iron Company, Plaintiff in Error vs. Frank W. Eaton and others, Defendants in Error, above referred to, was likewise brought to determine adverse 25
claims to a certain other tract or parcel of land containing forty acres according to the Government survey.

That the plaintiff in error claimed title to said tracts of land under and by virtue of patents issued by the United States and that the defendants claimed title to said lands by virtue of two certain locations of Sioux Half-Breed Scrip, issued under the Act of Congress of July 17th, 1854, (10 Stats. 26
304) made by the defendant in error, Frank W. Eaton, claiming to act as agent for one, Orillie Stram, a Half-Breed of the Sioux Nation, to whom the certificates or scrip, by means of which said locations were procured, were originally issued. That said locations by the said Frank W. Eaton, claiming to act as aforesaid, were cancelled in pursuance of a decision of the Secretary of the Interior, dated February 18th, 1889, and unpublished, 27
a copy of which appears in the transcript of record filed in this cause, and which, in so far as it relates to the principal facts, involved in said locations, was in the following words:—"Upon a care-"ful examination of the entire record, I find the "facts to be substantially as stated by your (Com-"missioner of the General Land Office) office de-"cision and outlined herein.

"Epitomized they are as follows:

"The scripee disposed of her scrip, surrender-
"ing possession thereof to some one now unknown.
"Said scrip was accompanied by two powers of
"attorney, executed in blank, one giving author-
"ity to some one not then named, to locate the
28 "scrip; the other, giving a like authority to sell
"the land located upon. The scrip, after many
"years and after passing through several hands,
"lodged in the hands of Frank W. Eaton, who
"thereupon filled up the blanks in the power of
"attorney to locate, inserting his own name as
"that of attorney in fact for such purpose. He
"employed others to make slight improvements
"on the lands in question (then unsurveyed) and
29 "after such improvements, which were scarcely de-
"serving of the name, he located the scrip as at-
"torney in fact for Orillie Stram, the scripee.

"The blanks in the other power of attorney
"(that to sell) were filled up by inserting the name
"of Leonidas Merritt, who it appears was a busi-
"ness partner of said Frank W. Eaton, and said
"Merritt, as attorney in fact of the scripee, exe-
"cuted certain warranty deeds, transferring and
30 "passing title to the lands covered by the scrip
"locations to certain parties therein named, it
"appearing that said parties were Eaton, who had
"made the locations, and three men, Edward
"Byrne, James H. Powers and Joseph Clement,
"who had been by him, or through his agency,
"employed to make the improvements above men-
"tioned.

"Money consideration was expressed in said "deeds, but it is apparent from the evidence that "the real consideration, so far as Byrne, Powers and Clement were concerned, was what they had "done in making the improvements. They got an "undivided one-third interest. The residue went "to Eaton. 31

"The scripee never saw the land. At the date "of the location she had never seen Eaton, who "acted as her attorney in fact, and did not then "know that there was such a person in existence. "She had, as a matter of fact, sold the scrip long "prior to the location, and had no personal interest "in the land, nor were the improvements made for "her personal use and benefit. It was a matter of "no moment to her where the scrip was located, or 32 "whether it was located at all or not. Her ac- "tual interest in the matter ceased when she dis- "posed of the scrip. It was admitted by her so- "called attorneys in fact that she was to have no "interest in the land. For a long time she directly "and positively repudiated Eaton and Merritt as "her attorneys in fact, denying that they acted for "her in any capacity whatever. Afterwards and "but a few days prior to the hearing, she ratified 33 "by deed what had been done by them.

"This ratification, it is evident, was procured "at the solicitation of Eaton or Merritt, or both, "and for a consideration. But such ratification "does not change the fact that the improvements "and location, though made under the guise of a "power of attorney, were made, not under the di-

"rection and in the interest of the scripee, but for "the benefit solely of another not even known to "the scripee, viz: Eaton, who had inserted his "name as attorney in the power executed in blank. "If the location of the scrip was illegal and in- "valid, then the deed of ratification could not give
34 "it validity—could not vitalize that which origin- "ally had not in it the germ or essence of legal "vitality.

"This case is in all essential particulars like "that of Joseph W. Allen, et al. vs. Lewis Merrill, "et al., decided by me this day, (8 L. D. 207—re- "view denied, 12 L. D. 138) so far as the method "of making the scrip locations is a matter of con- "cern, and the reasons of that case are in this
35 "particular applicable to this. Following the rul- "ing of that case, I must hold that the scrip loca- "tions here in question are invalid, and your of- "fice decision so holding is affirmed."

That the said certificates or scrip, two in number, each called for 160 acres of land and by means thereof the said Eaton procured the locations thereof upon then unsurveyed public lands be-
36 longing to the United States, amounting in the aggregate to 320 acres, under the claim made by affidavit, that he was acting as the agent for Orillie Stram, and that the improvements made upon the said unsurveyed lands were made under the personal direction of said Orillie Stram, the Half-Breed, as aforesaid, and for her personal use and benefit. That shortly after the cancellation of said locations of said Sioux Half-Breed scrip,

the lands upon which the same had been located, having meanwhile been surveyed, were thrown open to entry under the public land laws of the United States and thereupon many persons attempted to enter the same, and out of the conflicting claims arising from the numerous attempted entries of said lands, grew controversies affecting 37
the said 320 acres of land so attempted to be appropriated by the said Eaton by virtue of said scrip locations, which have occupied the attention of the Land Department and the courts, State and Federal, including the Supreme Court of the United States, down to the present time, and some of which are still pending, as will be hereinafter more particularly set forth.

The report of the decisions of the Land De- 38
partment and of the courts, State and Federal, growing out of said controversies subsequent to the cancellation of said scrip locations, will be found in the following reports:

Hyde vs. Eaton (on Review), 12 L. D., 157.

McDonald et al. vs. Hartman, 19 L. D., 39
547.

McDonald et al. vs. Hartmann, 20 L. D., 324.

Germania Iron Co. vs. James, 82 Fed., 807.

Germania Iron Co. vs. U. S., 165 U. S., 379.

Germania Iron Co. vs. James, U. S. Cir. Court-Appeals 89 Fed., 811.

Germania Iron Co. vs. James, 98 Fed., 23.

Midway Co. vs. Belden, 98 Fed., 23.

40 The long contest before the Land Department involving the scrip locations and the claims of one Hyde, is referred to in

Hyde vs. Bishop Iron Co., 66 Minn., 24.

Hyde vs. Bishop Iron Co., 177 U. S., 281.

That, including the contest and proceedings relating to the cancellation of said scrip locations the controversy or controversies relating to said
41 320 acres of land have been pending before the Land Department and the courts for more than sixteen years.

Deponent further saith that the Supreme Court of the State of Minnesota, in and by the judgments, to review which the Writs of Error were sued out in said cases No. 312 and 313, as above stated, held that the cancellation by the Secretary of the Interior (or in pursuance of his
42 said decision of February 18, 1889) of the said scrip locations, was unauthorized and illegal and held that no title whatever was derived under the patents issued by the United States Government.

Deponent further saith that all of the litigation both in the Land Office and in the courts, State and Federal, subsequent to the cancellation of said scrip locations in the year 1889, between

the various claimants of said land, has proceeded and been conducted upon the theory and in the belief that the cancellation of said scrip locations was lawful and valid, and that there is a considerable amount of important litigation now pending in the Federal Courts involving the title to said 320 acres of land, or some portion thereof, 43
which is dependent upon the validity of the judgment of the Supreme Court of Minnesota, above referred to, upon which said Writs of Error were sued out, a particular reference to which will now be made.

First. There is the case of Houghton E. James and Charles W. Hillard, appellants, vs. The Germania Iron Company, appellee, now pending in the United States Circuit Court of Appeals, for 44
the Eighth Circuit and assigned for argument on November 21st, A. D. 1900, the printed record in which consists of 811 pages.

Second. There is the case of James Belden, appellant, vs. The Midway Company, appellee, now pending in the said United States Circuit Court of Appeals for the Eighth Circuit and assigned for argument on November 21st, 1900, the printed record of which consists of 787 pages. 45

In neither of said causes is the right, if any, derived under said scrip locations, in anywise involved and in both of said suits is involved the title as between the parties thereto to one of the forty acre tracts comprising a part of the 320 acres embraced in said scrip locations, to-wit, the northwest quarter of the southeast quarter of section

thirty in township sixty-three north of range eleven west of the fourth principal meridian, situate in the State of Minnesota.

That said causes are both being pressed for final determination by the Supreme Court of the United States, but that underlying the rights of
46 the parties in said causes is the right if any, of the said Eaton and his co-defendants in error under said scrip locations.

That if it should ultimately be determined that the judgment of the Supreme Court of the State of Minnesota is without error and should be affirmed, that then the said cases and both thereof would be abandoned for the reason that it would conclusively appear that neither of the parties to
47 said causes had any right or title to the land involved therein, and on the other hand by reason of the great value of the property in controversy and the necessity of developing the bodies of mineral known or supposed to exist thereon, without further delay, it is reasonably certain that said causes will be pressed to their final determination at great expense rather than to await the determination by the Supreme Court of the United
48 States of the question of the validity of the title of said Eaton and his co-defendants involved in the said causes number 312 and 313.

Third. There is also pending in the Circuit Court of the United States for the District of Minnesota, Fifth Division, another case between the Midway Company, Complainant, and Frank W. Eaton and others, Defendants, involving the valid-

ity of the said scrip locations as to three 40 acre tracts of land, the same being a part of the said 320 acres of land attempted to be located, in which cause a stipulation has been signed and filed staying proceedings therein and agreeing to abide the event of the decision of the Supreme Court of the United States in said cause of the Midway Company, plaintiff in error, vs. Frank W. Eaton and others, defendants in error, above referred to. 49

Deponent further says that he is informed in such manner that he believes it to be true, that there are other lands situate within the State of Minnesota, and also elsewhere, upon which parties have located so-called Sioux Half-Breed Scrip issued under the act of July 17th, 1854, which locations have been cancelled by the Land Department of the United States, each and every of which cancellations under the decision of said Supreme Court of Minnesota in the case above referred to, is invalid, and each and every patent issued by the United States to land upon which Sioux Half-Breed Scrip has ever been located and the location cancelled, for whatsoever cause, absolutely void. 50

And deponent alleges that by reason of the said decision the uniform construction of said act of July 17th, 1854, by the Land Department of the United States, as well as by the Courts, has been overthrown and that much litigation will result, based upon and growing out of said decision, especially in the State of Minnesota, where, as deponent is informed in such manner that he believes it to be true, a considerable amount of Sioux 51

Half-Breed Scrip has been located, and deponent alleges that litigation has already begun in Minnesota growing out of and based upon said decision, as hereinafter set forth.

Deponent further alleges that there have been many cancellations by the Land Department, of
52 locations of Sioux Half-Breed Scrip, beginning at an early period and continuing to the present time, but as to the number thereof he is unable to state even a belief, for the reason that all of the decisions cancelling Sioux Half-Breed Scrip locations are not reported or published because as not having gone beyond the Commissioner of the General Land Office, or for other causes, but deponent refers to the following published decisions of the
53 Land Department cancelling Sioux Half-Breed Scrip locations, to-wit:

Allen vs. Merrill, 8 L. D., 207 (on Review), 12 L. D., 138.

Hyde vs. Eaton (on Review), 12 L. D., 157.

Walter Bourke case, 12 L. D., 105.

Cyr vs. Fogarty, 13 L. D., 673.

54

McGregor vs. Quinn, 18 L. D., 368.

Strong vs. Pettijohn, 21 L. D., 111.

Missola Elec. Light Co., 21 L. D., 306.

John W. Poe, 29 L. D., 309.

Deponent also refers to the following unpublished decisions of the Land Department which have come to his notice, to-wit:

Murphy vs. Jones, decided June 29th, 1876.

Eaton vs. Hyde, decided Feby. 18th, 1889.

John F. McGee, referred to in 14 L. D., 523.

55

Deponent also refers to cancellations referred to in the cases of Monette vs. Cratt, 7 Minn., 234.

Corsolle vs. Weyerheauser, 69 Minn., 328.

U. S. vs. Chapman, 5 Sawyer, 528.

Chapman vs. Pollock, 11 Pac. Rep. 767.

Carter vs. Ruddy, 166 U. S., 493.

56

Deponent further states upon information and belief, that very shortly after the rendition of the judgment of the Supreme Court of Minnesota, above referred to, suit was begun in the District Court of Lake County in the State of Minnesota, by the Buffalo Land and Exploration Company by William C. White, its attorney, against Hugh P. Strong and others, defendants, which action is based upon the said decision of the Supreme Court of Minnesota, and involves the validity of the locations of the so-called Sioux Half-Breed Scrip under the act of July 17th, 1854, which action is now pending and which seeks to have it adjudged that the holders of the patent title from the United States have no interest in or title to the lands embraced within the locations of the Sioux Half-Breed Scrip which were cancelled in pursuance

57

of the decision of the Secretary of the Interior, rendered in the case of Strong vs. Pettijohn, reported in 21 Land Decisions, 111, hereinabove referred to, and that the plaintiff in such case claims that the legal title to the lands in controversy passed to it or its grantors by virtue of the location of the Sioux Half-Breed Scrip and that the Land Department of the United States had no jurisdiction to inquire into the matter, and that the patent isssued by the United States Government conveyed no title whatever to said lands, whether legal or equitable. That deponent's information is derived from inquiries made of William C. White, the attorney for the plaintiff, and John Brennan, the attorney retained for the defendants or some of them, and from an inspection of the office copies of the papers in the office of said William C. White.

Deponent further alleges upon information and belief, that there is still outstanding unsatisfied and in the hands of persons other than the original beneficiaries, some considerable amount of so-called Sioux Half-Breed Scrip, which as deponent believes by reason of the decision of the Supreme Court of Minnesota, may be made the subject of sale to purchasers upon the face of the said decision of the Supreme Court of the State of Minnesota.

Deponent further alleges that the said decision of the Supreme Court of Minnesota, in the case above referred to, to-wit, The Midway Company, Plaintiff in Error, vs. Frank W. Eaton and others, Defendants in Error, decided and held:

First. That the clause contained in said act of July 17, 1854, to-wit: "And provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid" did not prevent or prohibit an assignment by the Half-Breed before location, of the right evidenced by such scrip; that the beneficial interest in said scrip could be assigned and transferred although the scrip itself could not be, and that the right to acquire public lands by means of this scrip was not a personal right in the one to whom the scrip issued. 61

Second. That the clause in said act, providing that said scrip might be located upon "any other unsurveyed lands not reserved by the government upon which they (the Half-Breeds) have respectively made improvements" did not require 62 that any improvements should be made by the Half-Breed or by anyone else as a condition precedent to the location of the scrip thereon, nor at all, unless possibly for the purpose of giving notice to some possible settler upon the same lands, and that in any event such improvements might be made by one, not the original beneficiary, for himself and as a means of procuring the location of the scrip for his own use and benefit. 63

Third. That as the act of July 17, 1854, did not provide for the issuance of a patent, that no patent was necessary, and the legal title to the land passed by virtue of the location, and the Land Department had no right to assume a supervisory power over the location of Sioux Half-Breed Scrip and no jurisdiction to inquire into the same.

And deponent appends hereto a copy of said decision, which is published in 82 Northwestern Reporter, page 861, and prays reference to the same.

Deponent further saith that no where in said decision are the cases of Carter vs. Ruddy, 166
64 U. S., 493; Felix vs. Patrick, 145 U. S., 317, or other decisions of the Supreme Court of the United States referred to, although deponent alleges that both upon the oral argument and in his printed brief in the case in question before the Supreme Court of the State of Minnesota, were said cases pressed upon the attention of said court.

Deponent further saith that the said decision of the Supreme Court of Minnesota, now consti-
65 tutes the law of said state and affects many titles in said state, but as to the number of titles so affected deponent is unable to form an opinion.

Deponent prays that the said cause of the Midway Company, Plaintiff in Error, vs. Frank W. Eaton and others, Defendants in Error, being case No. 312 upon the October, A. D. 1900 Term Calendar in the Supreme Court of the United
66 States, may be advanced upon said Calendar and heard as speedily as may be, but not before January 1st, A. D. 1901, to the end that titles depending upon Sioux Half-Breed Scrip locations may be settled, that the public may be safe-guarded in the matter of any attempted purchase of outstanding certificates or scrip issued under the act of July 17th, 1854, that the powers and duties of the Land Department in matters relating to Sioux

Half-Breed Scrip may be defined and settled; that the litigation dependent upon said case of the Midway Company, Plaintiff in Error vs. Frank W. Eaton and others, Defendants in Error, may be settled and terminated and further litigation affecting other lands and between other parties based upon or growing out of said decision of the Supreme Court of the State of Minnesota made unnecessary. 67

WALTER AYERS.

Subscribed and sworn to before me this 27th day of October, A. D. 1900.

E. P. KIRBY,
Notary Public,
(Notarial Seal.) St. Louis County, Minn. 68

69

MIDWAY CO. vs. EATON, ET AL.

COPY OF OPINION OF

SUPREME COURT OF MINNESOTA.

244

MIDWAY CO. v. EATON et al.

(Supreme Court of Minnesota. May 16, 1900.)

PUBLIC LANDS—HALF-BREED SCRIP—LOCATION—SECRETARY OF INTERIOR—AUTHORITY—CANCELING LOCATION.

1. By virtue of the act of congress of July 17, 1854 (10 Stat. 304), there was issued to one Orillie
245 Moreau, a mixed blood of the Sioux Nation, five pieces of what is known as "half-breed scrip"; one of these pieces, for 160 acres, being described as "No. 19 D." This piece was located June 18, 1883, on unsurveyed lands in the Duluth district by one Eaton, who held a power of attorney executed and delivered by the recipient of the scrip and her husband,—she having married a man named Stram in the meantime,—which power authorized Eaton to locate the scrip, and to do all acts necessary to secure a permanent and bona fide location thereof. After the land was surveyed, and on July 21, 1885, the location was adjusted at the local
246 office to governmental subdivision on the application of the attorney in fact. In a contest instituted by one Hyde, who claimed the land under the pre-emption act, the commissioner of the general land office held the Stram entry unauthorized and invalid, and that the same should be canceled and set aside. This decision was affirmed by the secretary of the interior February 18, 1889. Hyde's claim was disposed of adversely to him at the same time. The land was subsequently patented by the United States to one Hicks, under the homestead act, and Hicks' successors in interest brought

this action to determine adverse claims against defendants, who assert ownership under the Stram entry. On findings of fact the court below held, as conclusions of law, that the plaintiff held the legal title to the land in trust for defendants, in certain undivided shares, and that said defendants were and are the owners thereof, and ordered judgment accordingly. **Held,** that the secretary of the interior acted without the authority of law when he decided the Stram entry or location to be 247
unauthorized and invalid, and for that reason affirmed the order of the commissioner canceling the same.

2. **Held,** further, that the scripee, or her successors in interest, could not be deprived of their rights in the land by the assumption of a supervisory power by the officials in the land department, or by the issuance of a patent to another.

3. **Held,** that the findings were supported by the evidence, and justified the conclusions of law.

(Syllabus by the Court.)

248

Appeal from district court, St. Louis County; S. H. Moer, Judge.

Action by the Midway Company against Frank W. Eaton and others. Judgment ordered for defendants. From an order denying a new trial, and from the judgment, plaintiff appeals. Affirmed.

249

Walter Ayers (P. H. Seymour, of counsel), for appellant, J. L. Washburn, W. D. Bailey, Towne & Harris, Frank Cutting, and Phelps & McClintock, for respondents.

Collins, J. Action to determine an adverse claim to three governmental subdivisions situated in St. Louis county. The court below found against plaintiff, the corporation, and ordered judgment

in favor of the defendants, as owners of undivided interests. The appeal is from an order denying a new trial, and also from the judgment thereinafter entered. This case is another chapter of the controversy which has been in progress since 1883, in the courts and in the interior department of the
250 general government, over that well-known and very attractive section 30. The particular tracts here involved were referred to in the case of Iron Co. vs. Hyde, 66 Minn. 24, 68 N. W. 95, recently affirmed in the supreme court of the United States,as those upon which had been located, prior to the initiation of Hyde's claim, Sioux Half-Breed scrip No. 19 D, issued to a woman named Moreau, which location was contested by Hyde as therein
251 set forth,—a contest which resulted disastrously to both parties; the secretary of the interior finally sustaining the decision of the commissioner of the general land office that the scrip location should be canceled for noncompliance with the law, and that Hyde had no rights as a pre-emptor, because he had previously contracted to sell and convey to a third party a portion of the land he proposed to acquire. In 1898 the land in question,
252 a part only of that covered by the Moreau scrip, was patented by the United States under the homestead act to one Hicks, and the plaintiff's claim of title is derived from him. The defendants assert ownership through and under the scrip location; their position being that the same was unlawfully canceled by the officials of the land department, that the scripee could not be deprived of rights obtained under the location or entry, that

the patent subsequently issued to Hicks, inured to the scripee's benefit, and that the former and the plaintiff, who purchased with notice, held the land in trust for defendant. It is this trust which the court below enforced through the judgment appealed from. As we regard the case, the rights of the respective parties rest upon the legality 253
of the rulings in the land department; the last being the affirmance by the then secretary of the interior of the order of cancellation, as made by the commissioner of the general land office August 4, 1888. This affirmance bore date February 18, 1889, and is unpublished. It was sustained by the successor in office of said secretary. See Hyde vs. Eaton, 12 Land Dec. Dep. Int. 157. In the Hyde Case much of the history of this contest in the department is related. The testimony was taken be- 254
fore the local land officers, who were of the opinion that the scrip entries were valid. Certified copies of the testimony of the witnesses produced at this hearing were received in evidence in the court below. The written opinion of the local officers, and the findings made by them, if any, were not there presented. Nor was there introduced the findings of fact and conclusions of the commissioner as they appeared, undoubtedly, in his decision 255
of August 4, 1888. But parts or all of these findings were recited in the decision of affirmance made by the secretary, of date February 18, 1889; a certified copy of the same having been received in evidence at the trial. From this copy and other testimony it appears that on June 18, 1883, one Eaton, as attorney in fact for the Half-Breed, who

had in the meantime married a man named Stram, and who will hereinafter be called Mrs. Stram, filed the scrip in question, with other pieces, upon tracts of unsurveyed land in the Duluth district. The necessary affidavits, with the powers of attorney, and diagrams to locate and identify
256 the tracts, were also filed. All of the steps required by the rules and regulations of the land department seem to have been taken in due form. July 21, 1885, upon the application of the attorney in fact, scrip No. 19 D was adjusted by the local officers to the governmental subdivisions herein involved, and other subdivisions; the land having been surveyed by the authorities just previously. The Hyde contest was commenced the day before.
257 We now come to facts which, from the decision of the secretary, it appears were found by the commissioner in his decision affirmed by the secretary, as before stated: (1) It was found that accompanying the scrip, and application to locate the same, was what purported to be the original power of attorney given May 25, 1883, by the scripee and her husband to Frank W. Eaton; that with the application was an affidavit by said Eat-
258 on setting out that he, under said power of attorney, had caused to be built upon the tracts upon which the scrip was located a house 14 by 16 feet, one story high, of timber, covered with split shingles, with doors and windows; that he also had cleared one-half acre of land. And also setting forth: (2) That said improvements were made under the personal direction of the scripee, and for her personal use and benefit. (3) It was

found by a clear preponderance of evidence that said Eaton, by virtue of his power of attorney, employed Edward Byrne to make the improvements upon the tracts in question, and that Byrne secured the services of Powers and Clement to assist him in the matter. (4) That Eaton admits 259
that the power of attorney under which he acted was executed by the scripee in blank; that he never saw the scripee until March 31, 1886, never saw the land, and did not know whether said scripee ever saw it or not ;that the deed of confirmation by the scripee appears, so far as she and Eaton are concerned, to remove any objection to the acts previously performed by the latter under and by virtue of his said power of attorney. (5) That in 260
the record are what purport to be an original power of attorney given by the scripee and her husband to Leonidas Merritt, granting him full power and authority to enter upon and take possession of any and all pieces or parcels of land in the state of Minnesota which they then owned, or might thereafter acquire or become interested in, by virtue of the location of the scrip in question; to prosecute and defend any suit at law in the courts 261
of said state; and to grant, bargain, sell, demise, lease, convey, and confirm said land, or any part thereof, by deed, conveyance, demise, or lease, in the same manner as if performed by them individually. (6) That on March 31, 1886, the scripee and her husband joined in a deed of confirmation ratifying and confirming, all and singular, the acts of Frank W. Eaton and Leonidas Merritt relative to

the tracts in question, done and performed by them under the respective powers of attorney given as hereinbefore described.

The decision contains further recitals of findings, which appear to us to be of no value when passing upon the main question before us, and
262 we shall have no occasion to again refer to them, except incidentally. The decision proceeds, after stating facts, as follows (the italic being our own): "This would seem, on its face, to point to an adjudication in favor of the scrip locations; but your office decision further proceeds to say that the only other question left to pass upon, touching the legality of these locations, is whether the power of attorney given by the scripee to Frank W.
263 Eaton, by virtue of which he made the location, *could carry with it, under the law, the power and authority to make the improvements* which were necessary as a prerequisite to valid location of the scrip on unsurveyed land. On this question your office decision concludes that since the evidence shows clearly that the scripee in this case never saw the land or the improvements, or had anything whatever to do therewith, and since the circular referred to supra requires that the Indian
264 shall have a direct connection with the land, and claim the same for his or her personal use, the thing whatever to do therewith, and since the *circular referred to supra requires that the Indian shall have a direct connection with the land, and claim the same for his or her personal use*, the scrip locations are not valid, and should be canceled, as speculative and made with an evident intent to evade the law, rather than to comply in

good faith with legal requirements." The circular referred to was one issued in 1864 by the land department to the local officers, in which the latter were advised that scrip could be located: "(4) Upon any other unsurveyed land,, not reserved by government, upon which they have respectively made improvements. (5) When not located by the 265
reservee in proper person, the application to locate must be accompanied by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee. The land selected in satisfaction of a certificate of scrip must, of course, be located in the name of the party in whose favor the scrip is issued; and the location may be made by him or her in person, or by his or her guardian or duly 266
authorized agent." The secretary then proceeds to consider the facts, "epitomized," as he claims, making several statements which are not founded upon any evidence now before us; and then he characterizes the improvements as "scarcely deserving the name." In all essential particulars, said the secretary, the case is like that of Allen vs. Merrill (decided by him on the same day) 8 Land Dec. Dep. Int. 207, review denied in 12 Land Dec. 267
Dep. Int. 138; and, following the ruling in that case, the secretary held the location invalid. If, on the facts as found, the secretary correctly interpreted and applied the law which governs in such cases, his decision must be upheld. But, if there was error in the construction of the statute, the decision is of no binding force in this litigation. Before considering the law under which the scrip

was located, let us briefly refer to the facts found by the commissioner of the general land office, according to the secretary's decision. The contents of the affidavits as to the extent of the improvements made by Eaton are recited, and inferentially, at least, are found to be true. These im-
268 provements consisted of a log house 14 by 16 feet in size, one story high, covered with split shingles, with a door and a place for a window. Half an acre was cleared. This was done in June, under the direction of Eaton, who held a power of attorney, executed by Mrs. Stram and her husband, less than a month before, to locate this scrip, and "to do all acts necessary to secure a permanent and bona fide location thereof." We are clearly of the
269 opinion that, from the secretary's decision, it appears that the commissioner found these improvements to have been made prior to the location. And it also appears that the commissioner found that they were made by persons employed by Eaton for the purpose, and by virtue of his power of attorney; the question being, as stated by the secretary, whether the power to locate carried with it, under the law, the authority to make the improvements
270 required to be made upon the location of scrip on unsurveyed lands. As the scripee never saw the land or the improvements, had no direct connection with the land, and never claimed the same for her own personal use, it was held that the location was invalid, and the cancellation seems to have followed as a consequence.

The law under which scrip was issued to the Half-Breeds or the mixed bloods of the Sioux na-

tion was the act of congress of July 17, 1854 (10 Stat. 304). The act is not complicated, and in some respects is quite indefinite, but it empowered and authorized the president to cause to be issued to certain mixed bloods certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the Pepin 271
reservation among them pro rata. There was a provision that these certificates or scrip might be located upon the lands within the reservation, or upon other unoccupied lands subject to pre-emption or to private sale; that is, lands which had been surveyed, and also upon unsurveyed lands not reserved by the government, "upon which the applicants have respectively made improvements." There was a provision that these certificates or 272
scrip should not embrace more than 640 nor less than 40 acres each, and they were to be equally apportioned among those entitled. To ascertain who was entitled, reference must be had to the ninth article of the treaty of Prairie du Chien, of date July 15, 1830 (7 Stat. 331), from which it will appear that in a very general manner the reserved or Pepin tract was bestowed upon the Half-Breeds of the Sioux nation; they to hold as all other In- 273
dian titles were held. Thereafter, and as empowered by the 1854 act, the president caused certificates or scrip to be issued to these mixed bloods indiscriminately, and without reference to age, sex, or other conditions. The result was that old and young, adults and minors, male and female, those that had but little Indian blood in their veins and those in whom such blood greatly pre-

vailed, were the recipients. And this fact is not to be ignored when discussing the correctness of the secretary's views as found in his decision of February 8, 1889. Under the law there was issued to each one of the 640 persons (Mrs. Stram being one of the 640) five pieces of scrip, thus described:
274 1 A, 40 acres; 1 B, 40 acres; 1 C, 80 acres; 1 D, 160 acres; 1 E, 160 acres,—a total of 480 acres each. To each one of 38 persons there was issued one piece of 40 acres, and two for 160 acres,—in all, 360 acres to each. And this is another fact to be kept in mind. There was also another proviso in the act of July 17, 1854,—"that no transfer or conveyance of any of said certificates or scrip shall be valid." It is clear that this is a positive and em-
275 phatic prohibition on the assignability of the certificate or scrip, but it is not a prohibition upon a conveyance of the land upon which scrip had been located. As was said in Gilbert vs. Thompson, 14 Minn. 544 (Gil. 414): "No restraint is imposed upon the right of property in the land after it is acquired by location of the scrip. In the scrip itself the half-breed had nothing which he could transfer to another, but his title to the land, when perfect-
276 ed under it, was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him, and the title to the land acquired by it would vest in him, just as though no such attempt had been made. Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case

with an attempt to transfer a pre-emptive right. It would be simply ineffectual because the scrip is not transferable."

Further considering the law, it is well to look at the construction placed upon it by the officers of the interior department soon after scrip was issued to the beneficiaries,—a construction con- 277
temporaneous with the passage of the law. We find that immediately after its issuance a circular was promulgated by the commissioner of the general land office for the information and guidance of the local officers, a clause of which read that locations might be made "upon any unsurveyed land, not reserved by government, upon which they have respectively made improvements. Where the scrip may be located on unsurveyed lands 278
outside the reservation on which the Half-Breed has improvements and which is not reserved by the government, his application for location should be accompanied by a diagram and description denoting the natural objects and distances so as to fix with certainty the exact locality wanted, which serves as the best notice in our power to settlers that conflict may be avoided, and enable you, when the public surveys are made, to desig- 279
nate the legal sub-divisions embracing the location." 1 Lester Land Laws, 628. We have discovered that it was required, not that the improvements upon unsurveyed lands must be of a reliable or permanent character, or that they should be made by the scripee or under his personal direction, but that the application should be accompanied by a diagram and description,

that the exact locality might be designated, and thus, in connection with the improvements upon the ground, conflicts might be avoided between claimants, and the locations more easily and certainly adjusted when surveys were actually made. The making of improvements by or under the
280 scripee's immediate direction was not made of prime importance by the commissioner when preparing these instructions. The practice and custom of making scrip entries was definitely understood and well settled in the 17 years which followed, prior to the issuance of another circular in the year 1864, emanating from the same office and for a like purpose; and from this we have hereinbefore quoted. In this circular it was stated
281 that where a Half-Breed, for himself, may make actual settlement, his improvements will be notice on the ground to any other settler. And we are of the opinion that the purpose of this feature of the law, requiring improvements to be made where the scrip was located on unsurveyed lands, must have been that visible notice, by work done on the ground, might thereby be given to other persons of the scripee's prior right, and thus prevent col-
282 lision and conflict. The language as to improvements was general and vague. None were required where surveyed lands were located and it is very evident that this requirement was for a minor purpose. Obviously, it was not the design of the law to compel actual settlement or residence upon the land; for, had it been, the language would have been plain and unambiguous. This purpose was accomplished wherever the improvements

were of such a character as to be notice, and their value of extent was of little consequence. That in this case they were ample, as notice, ought not to be questioned. The entire purpose of the act itself seems to have been to promote and secure an exchange of the interests of the mixed bloods in the reservation, which was becoming valuable 283
for actual settlers, for certificates or scrip which would be available for the acquirement of title in fee to specific parcels of land there or elsewhere on the public domain. It was proposed to compensate the mixed bloods, who surrendered their rights or claims under the treaty, in a manner which would be of some value; and it has been held that the fact that the government saw fit to make the scrip, as such, non-assignable, does not operate to prevent the beneficiary from making 284
an agreement before location, or giving power to convey the land when the scrip shall have been located and the land entered.

We need not cite decisions in support of this proposition for they are abundant,—federal and state. Nor need we stop to consider why congress saw fit to declare that the scrip should not be assignable, and yet failed to deprive the scripee of 285
the power of alienation immediately after the location, and in pursuance of a bargain previously made. It is enough to know that the prohibition related solely to assignments of the scrip itself. So that, as before stated, the question is, was the land validly appropriated by the location of the scrip in the name of Orillie Stram, to whom it had been issued, with four other pieces; and the only

invalidity found by the commissioner of the general land office and the secretary was that Mrs. Stram had not seen the land or improvements, and did not have direct connection with either, and never claimed the same for her personal use. The rules and regulations of the land department had
286 not been compliel with, it was stated, and it was held that this was sufficient to justify the cancellation.

Under the decisions of the land department, as well as those of the courts, a scripee can empower another to do all things necessary as a condition precedent to a location, and then to actually locate. The improvements were made under the direction of a duly authorized agent, and then the
287 entry was made in the name of the scripee by the same agent or attorney in fact. Mrs. Stram did not complain of this entry, and urge that her rights had been disregarded. Upon the other hand, she ratified and confirmed every act performed by her attorneys in fact, by a properly executed deed, executed in March, 1886. Now, when we examine some of the provisions of the law, we are led to ask, could it have been the in-
288 tention that each person to whom certificates or scrip was issued should see the land, in person, upon which each piece was to be located, or should, in person, see the improvements, or claim the same for personal use, or be directly (that is, personally) connected with either or both? Under this law the president was authorized to do what was actually done,—issue to each person entitled several pieces of scrip, of different sizes or acre-

age. Was it expected that each of these persons should be personally connected with the several and separate improvements required to be made, if all of the pieces were located on unsurveyed lands and would have to claim the same for personal use? Surely not. This law contemplated and there was actually issued several pieces of 289
scrip to each of a large number of minors. Babes in arms were held to be entitled, and to them scrip was issued, anl in many cases located before the minors reached majority, as might reasonably be expected. With these facts before us, can it be urged that congress thought or intended that these minors would be required, by a construction of the law, to personally supervise the selection of from three to five tracts of land on which to locate 290
their pieces of scrip, or that they would have to be directly connected with each of these locations, or, in case unsurveyed lands were desired, they would have to claim the necessary improvements as their own? In other words, do not these facts indicate, to a moral certainty, that it never occurred to the members of congress that the construction placed on this law by the secretary would be given to it at any time,—much less, after 30 years of a wholly 291
different construction? And a construction, also, which received judicial recognition and approval. See Gilbert vs. Thompson, supra; Hope vs. Stone, 10 Minn. 141 (Gil. 114); Marks vs. Dickson, 20 How. 501, 15 L. Ed. 1002. We are confident that they do so indicate, and that the requirements found in the circular of May 28, 1878, were not in accordance with the law, and were therefore unauthoriz-

ed. The act itself never required that the improvements should be of a certain kind or value, or that the scripee should be directly connected with the land. It quite conclusively appears to the contrary, when we consider the facts before referred to, unless we take the position that the legislative
292 branch of the general government intended to confer upon the mixed bloods, in exchange for their interest in the reservation, scrip which would be of no value unless the recipients made personal selections, were directly connected with the locations and improvements, and made claim to both for their own use and benefit.

It is urged that Eaton's entry amounted to an evasion of that part of the law which forbade an
293 assignment of the scrip; the well-known rule being invoked, that an act which cannot be done directly cannot be accomplished indirectly. But if an agent can be authorized by the scripee to do all acts that may be necessary as a condition precedent to a location, and may also be authorized to carry the scrip to the land office and complete the entry (and this, it is well settled, may be done), why is not the prohibition evaded quite as com-
294 pletely as the secretary claimed it was in this case? The evasion is in every case where a contract of sale is made or contemplated, if it is in one. Locations under such circumstances have been repeatedly, almost universally, upheld; the officials of the department declaring, however, that the scripee cannot assign the scrip, that the location must be in the name of the person to whom the same was issued, and that the patent

must be so issued, but further holding that, as the power to alienate is unrestricted by the law, agreement to sell is not a matter for determination in the land department. It seems very apparent that the effect and validity of such an agreement must be left to the arbitrament of the courts, and not to the decisions of he government officials. 295

We have not discussed the point made by counsel, that as the method adopted by Mr. Eaton was in accord with the long continued practice of the department, as set out in its circular of 1857, the action of the commissioner and the secretary should be set aside as unwarranted. We think it unnecessary. Nor do we consider at length the further point that the location of July 21, 1885, after the lands had been surveyed and the plats 296 returned, was a valid location, even if the earlier one was invalid for the reasons assigned by the officials. It is true that the Hyde claim was the only one intervening when this crip was adjusted or again located, and that claim was corrupt and invalid, as has been finally determined. So when the application of July 21st was made there was no valid, existing, adverse right which had attached, and which stood in the way of a location 297 of the scrip as upon surveyed lands, no improvements being necessary. There was no forfeiture of the scrip by the previous attempt to locate. If invalid, it was nothing but an attempt. No moral turpitude or breach of any legal duty was involved in the first location. If Mr. Eaton, as the agent, had there expressed a desire to withdraw and relinquish all rights acquired previously, and

to lay that particular piece of scrip on the land in question, as of that day, would not his right so to do seem unquestionable? And would not the obligation of the local officers to permit this act to be done appear to be beyond doubt? If this be true, why was not the legal effect of the adjust-
298 ment a location of the scrip upon surveyed lands, there being no valid claim or right intervening and in conflict? The application then made was sufficient in form for an original location. If the scripee, Mrs. Stram, either in person or by agent, could that day have successfully applied for this land, had she never made any previous attempt to obtain it, why should the application be rejected? Surely not on the ground that she had tried
299 before, and failed while the land was unsurveyed. Our conclusion is that upon the facts as found, hereinbefore stated, the commissioner of the general land office and the secretary of the interior erroneously construed the law, and imposed unwarranted conditions. The decision of the latter appears to have been predicated upon a circular of instructions, not upon a statute. It was error to hold that under the act in question it was vital
300 that the scripee should see the land or the improvements prior to the entry, and that an agent could not act in her behalf, when duly authorized, not only in selecting the land itself, but in making such improvements as would in themselves, and without regard to their value, be notice on the ground of the assertion of a prior right. It was error to hold that the scripee had nothing to do with these improvements, for she had empower-

ed an attorney in fact to make them. It was error to hold that the scripee must have direct connection with the land. And if, by his decision that the scripee must claim the land for her own personal use, the secretary meant that such claim must be formally made, or made in good faith, or must be established by proof other than or different from that before the land department in this particular case, he was in error. There was not even an intimation in the law that the scripee should personally inspect or select the land, or should make in person, or even examine, the improvements. Scrip was issued in from three to five separate and distinct pieces, and of different acreage. It was issued to persons who were old and decrepit,—physically and permanently incapable of complying with the requirements established by the secretary. Was the fact that they were old and disabled to be used to their injury, and were they to have nothing but unavailable pieces of paper? Certificates of scrip were issued to infants who would not reach a suitable age for obeying the behests of the land officials for a score of years. Were they expected to act through guardians or other agents, and have some benefit of the provisions of the law, or were they expected to wait until majority came to them, and then to comply with the circular requirements? No distinction or discrimination was made in the law between the adult and the minor, and the department could impose none by requiring less of the minor making a location than of the adult. Nor did the law require that the land on which the

301

302

303

scrip was located must be selected by the mixed bloods for personal use, or even that a claim of this kind should be made. In fact, as we have seen, the inference to be drawn from its language, and from what was done at and about the time, is to the contrary. And the secretary erred in holding, upon the facts as found, that the scripee had
304 no interest whatever in the location made by her attorney in fact. Such a holding is, in effect, deciding that every piece of scrip issued to the mixed bloods which cannot be used by the recipient for his or her own personal benefit, and for the acquirement of land for his or her own personal use, could not be used at all, and was of no value.

Finally, we hold that on the facts and the law
305 the location in behalf of Mrs. Stram was proper and valid. It was error on the part of the officials of the land department to cancel the location and entry. Mrs. Stram or her successors in interest could not be deprived of her rights in the land by the assumption of a supervisory power by these officials, or by the issuance, under their direction, of a patent to another person. The act of July 17, 1854, did not provide for the issuance of a patent, and the title to the property passed to Orillie
306 Stram, nee Moreau, by virtue of the location. The findings of fact justified the conclusions of law in the court below, and the judgment is affirmed.

Lewis, J., did not sit.

[illegal/illegible]

[illegal/illegible]

IN THE

SUPREME COURT

OF THE UNITED STATES.

[illegal/illegible]

THE MIDWAY COMPANY,

Petitioner in Error,

vs.

FRANK W. EATON,
LEANDER SECRIST,
MERRILL M. CLARK,
RICHARD H. FAGAN and
MARGARETTE LOWSTONE,

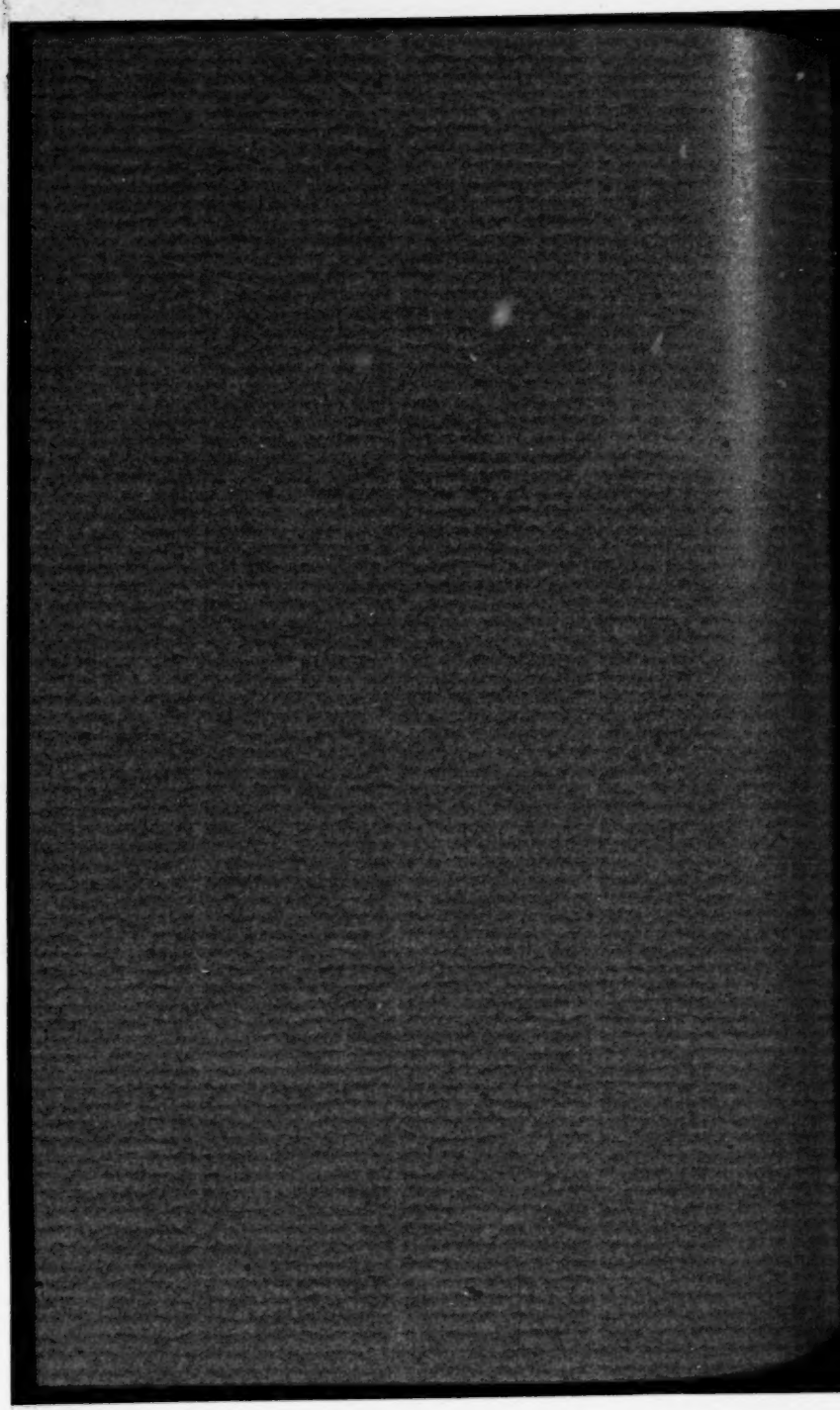
Defendants in Error.

AFFIDAVIT AND CONSENT

UPON MOTION TO ADVANCE CAUSE UPON THE CALENDAR.

CHAS. A. TOWLE,
JED J. WARBURTON,

Attorneys for Petitioner in Error.



SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

FRANK W. EATON,
LEONIDAS MERRITT,
MERRILL M. CLARK,
RICHARD H. FAGAN AND
MARGARETHA LONSTORF,
DEFENDANTS IN ERROR.

No. 312.

STATE OF MINNESOTA, }
COUNTY OF ST. LOUIS. }

JED L. WASHBURN, being duly sworn, says that he is counsel for the defendants in error, Leonidas Merritt, Merrill M. Clark and Richard H. Fagan, and is associated in said cause with Messrs. Charles A. Towne and Luther C. Harris, the counsel for the defendants in error, Frank W. Eaton and Margaretha Lonstorf.

That the counsel for the defendants in error have been served

with a notice of motion, to be heard on the 12th day of November, 1900, by Walter Ayers, Esq., counsel for the plaintiff in error, for the advancement of said cause upon the calendar, which motion papers consist in part of the affidavit of said Walter Ayers and a copy of the decision of the Supreme Court of the State of Minnesota in said cause.

That by way of response to certain matters set forth in the affidavit of said Walter Ayers, this affiant avers: That said action was brought by the said The Midway Company as plaintiff against the said defendants in error as defendants, in the District Court of St. Louis County, Minnesota, in April, 1899, for the purpose of determining adverse claims to Lots 3, 5 and 6 in Section 30, Township 63, north of Range 11 west, and was brought on for trial in said court on the 12th day of June, 1899; that said action involved the validity of certain Sioux half-breed scrip locations of said lands under which the defendants claimed to own the same; that said cause resulted in a judgment in favor of the defendants in said court, which judgment was rendered on the 2nd day of January, 1900, wherein it was decreed that the defendants were the owners of said lands.

That the Secretary of the Interior had, by the unpublished decision referred to in said moving papers, assumed to cancel said scrip locations and to throw the said lands open to subsequent entry, and through subsequent proceedings in the land department, to which the defendants were not parties, the plaintiff claimed to be the owner of the premises, with full knowledge, however, of the rights of the defendants, and in and by said judgment it was decreed that whatever title, if any, accrued by virtue of the patent issued to the predecessor of the plaintiff, should enure to the said defendants; that from an order denying a new trial and from said judgment said plaintiff appealed to the Supreme Court of the State of Minnesota and upon said appeal

the said Supreme Court of the State of Minnesota, by decision rendered May 16th, 1900, affirmed the decision of the trial court.

That in said action, brought as aforesaid in the said District Court of St. Louis County, Minnesota, the rights of said defendants, as to said lands, were brought in issue in court for the first time, all of the various litigation theretofore had, both in the land department and in the courts, being between the various parties who, subsequent to the entry of said lands under Sioux half-breed scrip, had attempted to obtain title thereto.

That although the Supreme Court of the State of Minnesota held, among other things on said appeal, that a patent was not necessary in order to pass the legal title on Sioux half-breed scrip locations, nevertheless as to whether said patent was necessary to pass the legal title was not material to the determination of the rights of these parties upon said appeal in the said Supreme Court of Minnesota, and the Secretary of the Interior, in the decision referred to in said moving papers, had already held that such patent was not necessary.

Deponent further says that he is informed in such manner that he believes it to be true, that the defendants and their predecessors in interest have maintained possession of said premises ever since the location of the same by means of said Sioux half-breed scrip.

This deponent further says, upon information and belief, that very little, if any, Sioux half-breed scrip remains outstanding unlocated, and that the greater portion of such scrip has long since been located, and, as he is informed in such manner that he believes it to be true, located in practically the same manner as that involved in this case, and that the said decision of the Supreme Court of Minnesota does not operate to unsettle, but rather to settle the multitude of titles already held under Sioux half-breed scrip locations, and that it is claimed by the defend-

ants in error that the location of the scrip in the case here involved was in strict accordance with the uniform practice of the land department down to the time when the Secretary of the Interior assumed to cancel the scrip locations in this case and, simultaneously therewith, the scrip location involved in the case of Allen vs. Merrill, referred to in the moving papers.

Deponent further says that it is true that subsequent to the said decision of the said Supreme Court of Minnesota, hereinbefore referred to, the same plaintiff, The Midway Company, brought suit in the Circuit Court of the United States for the District of Minnesota, Fifth Division, against the same defendants, to determine adverse claims to three other forties of land involved in the same locations, the said scrip locations, in fact, having covered 320 acres of land, and that the said case was upon the calendar of the October, 1900, term of said court at the City of Duluth in said division, and said cause was disposed of by stipulation that the same should abide the decision of the Supreme Court of the United States in this case.

That as to the statement contained in the affidavit of the counsel for the plaintiff in error, relative to the decision of the Supreme Court of the State of Minnesota in said cause, this deponent craves reference to said decision as to what was determined by the said court thereby.

Deponent further says that the record in this case as to said scrip locations will show that Frank W. Eaton, desiring to acquire the said lands, or an interest therein, made arrangements with the scripee, Orillie Stram, through her agent, for the location of her Sioux half-breed scrip thereon, and that said Orillie Stram executed a power of attorney to locate the same which, being delivered to said Eaton, together with said scrip, he proceeded to locate and enter said lands thereon in the name of said Orillie Stram; that said Orillie Stram also executed a power of attorney

to convey the same, under which said lands were conveyed after location, and thereafter executed and delivered to said Frank W. Eaton, her husband joining therein, a deed in full confirmation of the location and entry of said lands and the conveyance made thereof, prior to any adverse rights or interests attaching thereto, but that thereafter and after final receipt had been issued, delivered and recorded, upon an attack being made by an outside party who desired to obtain said lands, but whose entire proceedings therewith were held by the Secretary of the Interior, as well as by the courts, to be fraudulent and giving rise to no interest whatever, the Secretary of the Interior, by the decision referred to in the moving papers, assumed to cancel said scrip locations, after the rights of the defendants or their predecessors had become vested in said lands.

That as to the cases of James vs. Hilliard and Belden vs. The Midway Company, referred to in the moving papers, affiant states that both refer to the same forty acre tract of land and admits that if this cause is decided in favor of the defendants in error, the effect of the determination will be to dispose of any claim on the part of either party in said actions to the tract of land there involved, said tract being the remaining forty acres covered by said Sioux half-breed scrip locations; but neither this deponent nor his clients have any interest in the determination of said actions, nor do they know, except by the moving papers herein, that the same are set down for hearing on the 21st day of November, 1900, but deponent suggests that the advancement of this cause upon the calendar to January, 1901, without some order of the court in the cases above referred to, would work no relief to the court from the burden of hearing said causes, and that because said cases are set for hearing in November, 1900, is without force as a reason for the advancement of this cause upon the calendar to January, 1901.

Deponent further says, upon information and belief of such character that he believes the same to be true, that the other actions referred to in said affidavit and in said moving papers involve in no material degree the public interest.

That this affidavit is not made for the purpose of resisting any application properly made for forwarding said cause upon the calendar, but is made for the purpose of not leaving unchallenged certain statements and imputations contained in the moving papers, believed by the defendants in error to be wholly irrelevant and immaterial to a motion to advance said cause upon the calendar; that this deponent has professional engagements in court which will occupy well nigh all of the month of January, 1901, and desires that said cause be not advanced upon the calendar earlier than February 1st, 1901.

JED L. WASHBURN.

Subscribed and sworn to before me this 1st day of November, 1900.

WILLIAM D. BAILEY,
Notary Public, St. Louis County, Minn.

[Notarial Seal.]

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,
PLAINTIFF IN ERROR.

VS.

FRANK W. EATON,
LEONIDAS MERRITT,
MERRILL M. CLARK,
RICHARD H. FAGAN AND
MARGARETHA LONSTORF,
DEFENDANTS IN ERROR.

Now come the defendants in error in the above entitled cause and, upon the foregoing affidavit, consent that the said

cause may be forwarded upon the calendar for hearing not earlier than February 1st, 1901.

Dated, November 1st, 1900.

CHAS. A. TOWNE,
Attorney for Defendants in Error, Frank W. Eaton and Margaretha Lonstorf.

JED L. WASHBURN,
Attorney for Defendants in Error, Leonidas Merritt, Merrill M. Clark and Richard H. Fagan.

OCT 11 1901
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

Brf. of Ayers for P.C.

OCTOBER TERM, 1900.

Filed Oct. 11, 1901.

THE MIDWAY COMPANY, Plaintiff in Error,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF, Defendants in Error.

No. 8

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR.

WALTER AYERS,
Attorney for Plaintiff in Error.

P. H. SEYMOUR,
Of Counsel.

J. L. TIHLING,
BOOK AND COMMERCIAL PRINTER,
DULUTH, MINN.